

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

VS.

AND

AND

Docket No. 181,156

## ORDER

**ON** the 21st day of April, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of a Preliminary Hearing Order entered by Administrative Law Judge John D. Clark, dated February 17, 1994, came on for oral argument.

## APPEARANCES

Claimant appeared by and through her attorney, Tamara J. Pistotnik of Wichita, Kansas. Respondent, a self-insured, appeared by and through its attorney, Kim R. Martens of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Kendall Cunningham of Wichita, Kansas.

## RECORD

The record considered for purposes of this appeal consists of the documents filed with the Division of Workers Compensation in this docketed matter, including the transcript of the Preliminary Hearing held on December 9, 1993, before Administrative Law Judge John D. Clark, the deposition of Betrice K. Cannon, taken December 27, 1993, and the exhibits attached thereto.

**ISSUES**

This is an application for review filed by the respondent from a preliminary hearing order awarding temporary total disability benefits, payment of outstanding medical expenses, and further medical treatment. The issues presented for this review are:

- (1) Whether the claimant suffered an accidental injury that arose out of and in the course of her employment with the respondent.
- (2) Whether timely notice was given.
- (3) Whether requirements of K.S.A. 44-510c(b)(2) were satisfied by the claimant for entitlement to temporary total disability payments.
- (4) Whether the Administrative Law Judge erred in ordering the respondent to provide claimant with the names of three physicians for medical treatment.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for purposes of the preliminary hearing, the Appeals Board finds as follows:

- (1) The first two issues raised by the respondent in its application for review in reference to whether claimant has suffered an accidental injury which arose out of and in the course of her employment and whether timely notice was given, are issues, if disputed, that are considered jurisdictional and subject to review by the Appeals Board. K.S.A. 44-534a(a)(2).

The Appeals Board, after reviewing the whole record, affirms in all respects Administrative Law Judge John D. Clark's Preliminary Hearing Order dated February 17, 1994, which ordered temporary total benefits, payment of outstanding medical expenses and further medical treatment.

In proceedings pursuant to the Kansas Workers Compensation Act, the burden of proof is on the claimant to establish her right to compensation and to prove the various conditions on which the claimant's right depends. K.S.A. 44-501(a). "Burden of proof" is the burden a party has to persuade the trier of fact by a preponderance of credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record. K.S.A. 44-508(g).

Claimant has established through her testimony and medical records admitted into evidence at the Preliminary Hearing held on December 9, 1993, before Administrative Law Judge John D. Clark, that it is more probably true than not true that she injured her back on July 29, 1993, when she turned one of the residents in bed while working with another employee. At the time of her injury, the claimant was working third-shift from the hours of 10:00 pm to 6:00 am.

Claimant finished her shift on July 29, 1993, went home and went to bed. When she woke up during the day, her back was hurting so bad that she went to the hospital emergency room for treatment. She was released to take Tylenol or Lortab and a muscle relaxer. At the same time that she was having problems with her back, she also was taking

chemotherapy for a cancer condition. The next treatment that the claimant received in reference to her back was with Terry L. Morris, D.O., on October 15, 1993. Dr. Morris gave the claimant anti-inflammatory medication and took her off of work from her injury date of July 29, 1993.

The claimant also saw Dr. Morris on September 24, 1993, but did not mention her back problem because she still had muscle relaxers and pain pills that were prescribed from the emergency room visit. By October 15, 1993, her back was again bothering her as she had taken all the medication prescribed by the emergency room.

(2) The respondent also raises the issue as to whether or not the claimant notified the respondent of her accidental injury within ten (10) days after the date of the accident. The Appeals Board finds, that for preliminary hearing purposes, the claimant notified the respondent within ten (10) days after she hurt her back while turning a resident in bed.

The claimant testifies that she notified Betrice Cannon, the charge nurse on duty, after she was injured on July 29, 1993. She also testifies that she contacted Betty Leis, acting nursing director, by telephone on July 29, 1993, and told her she injured her back while working third-shift on that date. Additionally, she indicates that she told the administrator of Medicalodge of her back injury.

Both Betty Leis, acting nursing director of Medicalodge, and Betrice Cannon, charge nurse on the night of the alleged accident, testified that they were not notified by the claimant that she hurt her back at work. Betty Leis testified that she did receive a telephone call wherein the claimant stated that she could not take it anymore and she could not work. It is Betty Leis' assumption that she was talking about her cancer problems as being the reason for her not being able to work, as she did not mention that she had hurt her back at work.

The Appeals Board finds, for preliminary hearing purposes, that the testimony of the claimant is credible and persuasive in establishing that she notified the respondent of her injury on the same day of her accident.

(3) With respect to the issues of whether requirements of K.S.A. 44-510c(b)(2) were satisfied when temporary total disability benefits were ordered and whether the Administrative Law Judge erred in ordering the respondent provide the claimant with names of three physicians for medical treatment, the Appeals Board finds that these issues are not reviewable as the Administrative Law Judge, pursuant to K.S.A. 44-534a(a)(2), has the authority to award these benefits in a preliminary hearing order pending a full hearing on the claim. Consequently, the Administrative Law Judge did not exceed his jurisdiction in awarding temporary total disability benefits and medical treatment for the claimant in this matter.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Preliminary Hearing Order of Administrative Law Judge John D. Clark, dated December 9, 1993, remains in full force and effect.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June, 1994.

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BOARD MEMBER

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- c: Tamara J. Pistotnik, 2831 E. Central, Wichita, KS 67214  
Kim R. Martens, 200 W. Douglas, Sixth Floor, Wichita, KS 67202  
Kendall Cunningham, 1416 KSB&T Building, 125 N. Market, Wichita, KS 67202  
John D. Clark, Administrative Law Judge  
George Gomez, Director